

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own)	RULE AND REGULATION NO. 192
motion, seeking to amend Title 291, Chapter 1,)	
Rules of Commission Procedure, to update the)	
chapter in its entirety.)	COMMENTS

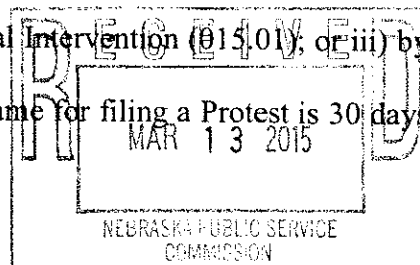
COMMENTS OF SPRINT

Sprint Communications Company, L.P., Sprint Spectrum L.P., Nextel West Corp., Nextel Boost West Corp., and NPCR, Inc., (collectively, "Sprint") respectfully submit the following comments in response to the Commission's Order Releasing Second Set of Proposed Rules, and Seeking Comment, entered on February 3, 2015 (the "Second Order"). The Second Order proposes further amendments to Title 291, Chapter 1, Rules of Commission Procedure ("Second Proposed Rules"). The Second Proposed Rules are intended to comport with the Nebraska Model Rules of Agency Procedure (the "Model Rules") issued July 25, 1994, and to reflect statutory changes that have occurred since the last rewrite of the Rules of Commission Procedure (the "Current Rules").

Sprint believes that the Second Proposed Rules will dramatically change the Commission's historic procedural practices and serve to undermine (i) the Commission's ability to efficiently process uncontested matters and (ii) the rights and interests of parties engaged in a "contested case." Given these concerns, Sprint hopes that the Commission will carefully review Sprint's comments and those of other interested parties as it continues to rewrite its Rules of Procedure.

I. Current Procedural Rules Concerning Participation in Commission Proceeding

The Current Rules provide three ways that an interested party can become involved in a case – i) by filing a Protest (014); ii) filing a Petition for Formal Intervention (015.01), or iii) by filing a Petition for Informal Intervention (015.02). The timeframe for filing a Protest is 30 days



after the publication of the notice of filing of an application. (014.02) (the “Protest Period”). The Rule governing the timeframe for filing a Petition for Formal Intervention references the Rule establishing the timeframe for the filing of a Protest, thus establishing the timeframe at 30 days from the notice of the filing of the Petition. (015.01B) A Petition for Informal Intervention can be filed not later than 15 days prior to the date the hearing in the proceeding commences. (015.02A)

The current Procedural Rules also describe certain requirements for Protests as well as Petitions for Formal and Informal Intervention, including specific information designed to identify the “interest” of the person requesting participation in the proceeding and the scope of participation to which each type of intervention is entitled. The scope of participation of an Informal Intervenor is specifically limited, which gives the Commission certain discretion in granting leave for participation and if leave is granted, an Informal Intervenor is not considered a “party” to the proceeding.

The Commission has traditionally acted liberally to allow participation by interested persons in Commission proceedings. Unless the Commission, on its own motion, has required a hearing on a Petition, it has been the filing of a Protest or a Petition for Formal Intervention within the “Protest Period” that has triggered the scheduling of a hearing on the Petition. In the absence of the filing of a Protest or a Petition for Formal Intervention, the Commission has typically processed such proceedings on the basis of the filed pleadings under a modified procedural schedule without a hearing.

II. Proposed Rules Concerning Participation in Commission Proceedings

a. Formal or Informal Intervention Permitted Only in “Contested Cases”

Section 001.06 of the Proposed Rules adopts the statutory definition of “contested case” set forth in Administrative Procedure Act (“APA”) at Neb. Rev. Stat. Section 84-901(3):

“Contested Case shall mean a proceeding before the Commission in which the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined after a hearing before the Commission.”
[Emphasis added.]

However, Proposed Rule 004.03A states, in part, that a “. . .contested case begins with the filing of a petition and request for hearing” (emphasis added). This Rule leaves the petitioner (or the Commission on its own motion), to determine whether the case is a “contested case” by whether a hearing is sought in the Petition. Proposed Rule 004 deals exclusively with rules of practice and procedure for hearings, pleadings, interventions and protests in “contested cases.” For example, Proposed Rule 004.03 is exclusively dedicated to rules of intervention and protest in a “contested case”, i.e., a case requiring a hearing. However, there are no rules of practice and procedure in the Proposed Rules which permit or define how an intervention or protest is to be filed in a proceeding that is not contested, i.e., which does not require a hearing. If the applicant or petitioner does not request a hearing, and the Commission neither files a departmental complaint nor requests a hearing on its own motion, the resulting proceeding does not meet the definition of a “contested case.” The Proposed Rules simply do not provide for a method to intervene in a non-

contested proceeding. This procedural gap is quite troubling as the Commission has historically adjudicated many uncontested proceedings without a hearing when there have been no interventions or protests. In fact, the prevailing practice before the Commission has not historically seen petitions which specifically request a hearing, leaving the determination of whether a case is “contested” or not to the affirmative decision of an interested party to make it “contested” by filing a Protest or a Petition for Informal Intervention. This historic practice has been removed from the Proposed Rules.

b. The Proposed Rules Relating to Contested Cases undermine the rights of Applicants and Petitioners

With the Proposed Rules dealing only with interventions in proceedings already defined as “contested”, the implications of the Proposed Rules become very troubling for Applicants and Petitioners. The Proposed Rules still provide that Formal Intervenors become a “party” to the proceeding (See 004.02B). However, under the Proposed Rules, a Petition for Formal Intervention can be filed within five (5) days before the Hearing, and the Hearing Officer does not have to rule on the Petition for Intervention until 24 hours before the Hearing. (Proposed Rule 004.03A). The addition of a new “party” to a proceeding at such a late date seems to lack reasonable due process protection for the Applicant. Under the Current Rules, Formal Interventions must be filed within 30 days following the notice of filing of the Application or Petition, giving the Petitioner or Applicant sufficient time to prepare for the Hearing and to address the issues presented by all other Parties (See Section 015.01).

c. The Proposed Rules Incorporate APA Procedures Out of Context

The Commission's Proposed Rules are incorporating the APA's provisions governing "contested cases" and formal interventions out of context to the Commission's historic procedural processes. The Proposed Rules seem to presume that all cases before the Commission are "contested cases" from the beginning. This presumption dramatically alters the Commission's traditional intervention process to establish a contested case, from which all other procedural rules follow. Sprint believes that the historic practice of the Commission set forth in the Current Rules – permitting an interested person to become a party to a proceeding through a Protest or Formal Intervention filed no later than 30 days after the filing of a petition or application – provides the best protection of the rights of the petitioner or applicant, and the intervenor.

d. Agencies Are Not Required to Adopt the Model Rules

The APA does not require every agency to adopt every provision of the Model Rules. Section 84.909.01 specifically provides that

Any agency adopting a rule of procedure that differs from the model rules shall include in the explanatory statement provided for in section 84-907.04 a finding stating the reasons why the relevant portions of the model rules were impracticable under the circumstances

The legislative history of LB446, adopted by the Nebraska Legislature in 1994, which codified this section, underscores the flexibility of agencies in adopting the Model Rules. In introducing LB446, Senator Robert Wickersham testified that while he felt that there were certain "core areas" of procedures that should be uniform for all the agencies,

the Legislature acknowledged that an “agency could deviate from that core set of rules if it’s necessary in their particular instance. [See LB446 “Introducer’s Statement of Interest”, Ninety-Third Legislature, First Session, February 19, 1993, Committee on Government, Military and Veteran’s Affairs, p. 41]. The Commission’s traditional procedural process under the Current Rules establishes an efficient process, with meaningful due process protection for applicants, intervenors and the Commission, for adjudicating both “contested” cases and uncontested proceedings, and with liberal procedures for permitting relevant and vigorous debate necessary for the Commission to fully evaluate a wide spectrum of complex issues and the important interests of a broad array of participants. The Proposed Rules do not improve the procedural provisions currently established and traditionally used by the Commission, and therefore, the Commission should be allowed the flexibility to craft its procedures to accommodate its particular circumstances.

e. Proposed Rules Permitting Protests in Contested Cases Are Not Consistent With Other Proposed Rules

Proposed Rule 004.09(B) provides that any application which is not opposed through a protest or formal intervention within thirty (30) days of the date notice is published may be processed by use of affidavits and will be processed administratively without a hearing. However, the Proposed Rules do not provide any process or rules of

practice for filing a Formal Intervention in a case that is not a “contested” case, as previously discussed above.

Further, Section 004.09(B) directly contradicts the provisions of Section 004.03, dealing with the filing of Formal Interventions in a “contested case”. While Section 004.09(B) permits “any application” to be processed administratively without a hearing if no protest or formal intervention is filed within thirty (30) days of the date notice is published of such application, Section 004.03 permits a formal intervention in a “contested case” (one initiated by the filing of an “application” or “petition”—See 004.02) to be filed within five (5) days of a hearing, regardless of the time established for the hearing. Therefore, the provisions of Section 004.09 which authorize certain proceedings to be disposed of without a hearing, cannot be reconciled with provisions dealing with interventions and protests in a “contested case” pursuant to Section 004.03.

III. Conclusion

Sprint opposes the dramatic alteration of the Commission’s historic practices that the Proposed Rules represent and believe that the interests of the Commission and the rights of parties are undermined by the Proposed Rules.

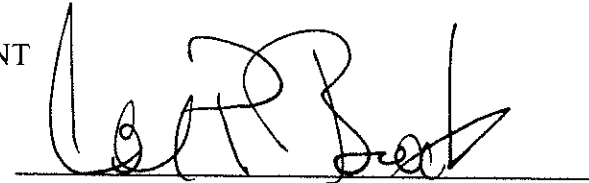
Given the authority under the APA for an agency to adopt rules of procedure that differ with the Model Rules, Sprint hopes that the Commission will continue to refine the Proposed Rules in a fashion that best meets its unique needs and that provides procedural and due process protection to the Commission and all interested parties. Sprint suggests that a conference with

the Attorney General's Office which would include a representative(s) from the Commission and interested parties who regularly practice before the Commission, including but not limited to commentators in this Docket, be convened as soon as possible to develop more appropriate rules of procedure for the Commission.

Respectfully submitted this 13th day of March, 2015.

SPRINT

By:

A handwritten signature in black ink, appearing to read 'Loel P. Brooks', written over a horizontal line.

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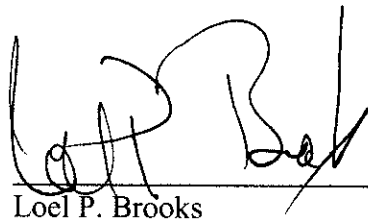
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of March, 2015, an electronic copy of the Comments of Sprint in Docket No. Rule and Regulation No. 192 were delivered to:

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The undersigned hereby certifies that on this 13th day of March, 2015, an electronic copy of the Comments of Sprint in Docket No. Rule and Regulation No. 192 were delivered to:

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